

January 31st 1770.

A N S W E R S

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JAMES COULTER Merchant in *Glasgow*, and others,

T O T H E

ADDITIONAL PETITION of Messrs CLAY and MIDGLEY
merchants in *Liverpool*, and GEORGE BROWN merchant in
Glasgow, their attorney.

THE respondents flattered themselves, that Messrs Clay and Midgley, would have suffered your Lordships to determine the question in dispute, upon the known principles of the law of Scotland; by which alone it must fall to be regulated. In this, however, the respondents were mistaken: These gentlemen, having been pleased to trouble your Lordships with an additional petition, merely for the sake of laying before the Court, the opinion of two gentlemen learned in the laws of England, viz. Mr Maddocks of Lincoln's-inn, and Mr Eyre recorder of the city of London: For, if the respondents are not mistaken, there is not a single argument urged in this additional petition upon the law of Scotland, or even a word used in it to show that the opinions of these gentlemen, so far as they seem to favour the case of the petitioners, are agreeable to that law.

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This being the case, the respondents believe, they might have saved, both to themselves and the Court, the trouble of an answer to this additional petition. They are persuaded that your Lordships, if you are still of opinion that your former interlocutor is agreeable to the law of this country, will not think yourselves at liberty to alter that interlocutor, even tho' you had more satisfactory evidence than the opinions of any counsel, however respectable their names, that it was not agreeable to the laws of England. The respondents, however, at the same time, flatter themselves, that they will be able to satisfy your Lordships, that the case, upon which these opinions were given, was by no means fairly stated to the learned counsel; and that of consequence, the opinions themselves do not even afford the means of discovering the ideas of these gentlemen upon the real merits of the question at issue; nay further, the respondents will be able to defend their plea, even upon the principles laid down by Mr Maddocks, in his answer to the case, which the petitioners were pleased to lay before him.

That the case has not been impartially and accurately stated, will be evident to your Lordships, upon attending to the following observations.

In the *first* place, it is taken for granted in the case, that the consignment of the tobacco in question, was not made in the common course of trade, but of purpose to pay the balance alledged to be due to Messrs Clay and Midgley the Liverpool merchants. But of this there is no evidence whatever, except a letter from one of the partners, and an affidavit of another of the Virginia company, cooked up, *ex post facto* after the bankruptcy of that company: No such thing is to be gathered from the letter advising the petitioners of the intended consignment; on the contrary, it would from thence appear, that it was made in the ordinary course of business.

In the next place, the petitioners have, in their case, omitted a most material part of the terms of the policy of insurance. They foresaw, that it would be impossible for them to obtain a favourable opinion, without making it be believed that M'Kittrick and company, the consigners, could have no such interest in the policy, as to entitle them to insist in an action in their own names against the under-writers, and without having it understood, that the sums under wrote by these underwriters were not to be considered as
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due to M'Kittrick and company, but to the petitioners, by whose orders the insurance was made by Messrs Buchanan and Simpson.

With this view, the petitioners set forth, that they wrote to their correspondents at Glasgow, desiring them to make insurance; and that, in compliance with these orders, these correspondents got insurance immediately made upon the tobacco, by a policy in favour of themselves, "or whosoever it concerns:" And upon this state of the case, Mr Maddocks, after mentioning, that the course of putting policies in suit in England, is by the broker indorsing upon the policy, that it was made in trust for such person as his principals had directed him to name; and that, if the broker names any other person, it is a breach of *trust*; he gives it as his opinion, that Messrs Buchanan and Simpson, the brokers employed by the petitioners, could not indorse upon the policy a declaration, that it was held in trust for M'Kittrick and company the consigners, without directions from the petitioners who were their principals.

But the true state of the case is, that in obedience to the instructions of the petitioners, the insurance was made by a policy in favour of Messrs Buchanan and Simpson, "*or whoever it concerns, as interest may appear for the sundry accounts, as per the initial marks subjoined;*" and that the hogsheds of tobacco in question were marked *A. M'K. and Co.* The meaning of the words, "Whoever it concerns, as interest may appear," is well known to be, "Whoever shall appear to have the property of the goods, when documents are produced." And on that account Messrs M'Kittrick and Co. whose property the goods undoubtedly were at the time of making the insurance, had a clear interest by the policy itself to insist against the under-writers for recovery of the money under-wrote by them, without any indorsation whatever from Messrs Buchanan and Simpson, the brokers employed to get the insurance made. These gentlemen were employed by the petitioners to get this insurance, not of their own accord, but in consequence of directions from M'Kittrick and Co. the proprietors of the goods. The insurance was therefore made for the behoof of M'Kittrick and Co. and they were the persons particularly denoted in the policy by the words, "Whoever it concerns, as interest may appear, as *per* the initial marks." They were the persons who would have been the sole losers, if no policy had been ordered; and of consequence the under-writers, upon the capture
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of the ship, becomen indebted to them, and not to the petitioners, who acted in this matter only as factors for M'Kittrick and Co. the proprietors of the goods insured: And indeed, were there any doubt as to this matter, it would be removed by Mr Midgley's own affidavit, in which he depones, "That the sum which was insured on the twenty hogsheds of tobacco from Virginia to Liverpool, was for, and on the proper account and risk of Anthony M'Kittrick and Co." From whence it appears, that at the very time when the petitioners made their demand of payment from the under-writers, they did not pretend to enter any claims upon their own account; but on the contrary, entered it openly as factors, and as acting for the behoof of M'Kittrick and Co.

After what has been said, it will appear evident to your Lordships, that Mr Maddocks's opinion, so far as it seems to make for the petitioners, proceeds upon an erroneous supposition. That gentleman lays it down, that sums under-wrote are only payable to the broker who makes the insurance, or to his employer, to whom he shall indorse the policy; and that as the petitioners had a title to demand an indorsement from Messrs Buchanan and Simpson, whom they employed as brokers, they must have a preferable right to the sums due by the under-writers; and for this he assigns a very plausible reason, viz. That if the under-writers were to contravert their being indebted to the consigners, neither they nor their creditors-arresters could make good their attachment for want of the policy. But the respondents are under no necessity of disputing those principles upon which the opinion proceeds; for in the present case the property and interest appear, not only from the initial marks in the policy, but also from the oath of the petitioners themselves, which must undoubtedly be equally sufficient as any declaration from the brokers, and must have afforded a good ground of action against these brokers, to compel them to indorse the policy to M'Kittrick and Co. if any such indorsement had been necessary.

The respondents may also further observe, that the petitioners in stating their case to their English counsel, have omitted to inform them, that the principal question was with the under-writers themselves, whose defence is founded upon the plea of retention competent to them as creditors to M'Kittrick and Co. on whose

whose account, and for the security of whose property, the insurance was made.

Mr Recorder Eyre's opinion seems to be founded upon the same erroneous supposition with that delivered by Mr Maddocks, viz. That the petitioners Messrs Clay and Midgley had the only right to the policy. It is therefore unnecessary to make any particular observations upon it.

The respondents, in the next place, beg leave to observe to your Lordships that, even according to the state of the case laid by the petitioners before their counsel, Mr Maddocks's answer to the fourth interrogatory unhinges the very argument upon which the petitioners seem chiefly to rely, viz. That a consignment made to a creditor cannot be recalled or altered by the configner, after the bill of loading is transmitted, and the ship has sailed. This argument is maintained with great length in the original petition: But Mr Maddocks's answer is decisive against them. The question put to him was, Whether, when a merchant in America consigns goods to a merchant in Britain for payment of a debt, and sends him previous advice of the consignment, and transmits the bill of loading, is it in the power of the American merchant, after the ship has sailed, to recall that consignment and dispose of it in any other manner? Or, Whether the consignment and bill of loading do so effectually transfer the cargo to the British merchant, that the destination cannot be altered by any subsequent order of the American merchant? To this question Mr Maddocks has returned a short, but pointed answer: That the configner may revoke the consignment; which in other words is saying, That the goods remain not only on the risk of the configner, but at his disposal. And there cannot be entertained a doubt, but that goods in such a situation may, by the law of this country, be effectually attached by arrestment.

It is true indeed, that Mr Maddocks, in his answers to the fifth interrogatory, gives it as his opinion, that after such consignment, and the transmission of the bill of loading to the British merchant, the cargo could not be intercepted and attached by the arrestment, or legal execution of any other creditor of the foreign merchant: But this will not avail the petitioners; because, according to the ideas of the laws of this country, it is absolutely inconsistent with the general principle laid down in the answer to the

foregoing interrogatory, in which the power of revoking consignments, even made for payment of a debt, is allowed to merchants in general. The respondents are entitled to lay hold of this principle, as a foundation for the plea which they maintain, in a question which must be decided by the law of this country. And Mr Maddocks's answer to the fifth interrogatory, where he applies himself immediately to the law of England, can at most only show, that there is a material difference between the municipal laws of Scotland and England; and that the law of the one country is more agreeable to principles, than the law of the other.

The respondents think it needless to detain your Lordships longer: They judged it to be vain to take the opinion of any counsel in foreign countries, upon a question that must fall to be determined by the law of Scotland alone; and they thought it the less necessary for them to do so, because they were informed that Mr Arthur, the arresting creditor, in the similar question presently depending between him and Messrs Heastie and Jamieson, had obtained the opinions of English counsel in favour of his right of preference upon his arrestments to these gentlemen, with regard to a parcel of goods which had been consigned to them by Archibald Dunlop the debtor, residing in America. It was the expectation of seeing these opinions produced in that question, that made the respondents delay so long to put in their answers to Messrs Clay and Midgley's additional petition. But as Mr Arthur's agent, who is likewise the agent for the petitioners in the present case, has not thought proper to produce these opinions in the other cause, the respondents do now cheerfully submit to your Lordships the determination of the present question, upon the materials already lying before the Court; and as they are advised that they have a clear right of preference to the petitioners, according to the principles of the law of this country, and agreeably to the decisions in cases of a similar nature they are hopeful, that your Lordships will have no difficulty of adhering to your former interlocutor.

In respect whereof, &c.

ALEX. WIGHT.